SIGNIFICANT DEVELOPMENTS IN FEDERAL GRANTS LAW IN THE PAST YEAR

FEDERAL BAR ASSOCIATION
Government Contracts Section
Grants Committee

National Grants Management Association 23nd Annual Training Conference
Rosslyn, Virginia May 2-3, 2002

The Grants Committee of the Federal Bar Association is pleased to provide the following information describing highlights in grants law from the past year. Section I covers legislative, regulatory, and administrative matters; Section II covers Federal cases.

I. Legislative, Regulatory, and Administrative Matters

Ceased Implementation of Executive Order 13202

On February 17, 2001, President Bush issued Executive Order (EO) 13202, " Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects." This order required executive agencies providing financial assistance for construction projects to ensure that recipients shall not: (1) require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same or other related construction project(s); or (2) otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise adhere to agreements with one or more labor organizations, on the same or other related construction project(s).

On April 6, 2001, President Bush issued an amendment to the EO providing that the head of an agency may exempt a particular project from the requirements of the order if the agency head finds that (1) any of the requirements or prohibitions set forth above existed as of the date of the order and (2) that one or more construction contracts subject to such requirements or prohibitions had been awarded as of the date of the order.

On January 25, 2002, the Office of Management and Budget (OMB) issued guidance to all Executive branch agencies that administer federal grants that are subject to the requirements set forth in EO 13202. Specifically, OMB advised that the EO had been the subject of litigation in the Federal courts, and an appeal was currently pending in the U.S. Court of Appeals for the D.C. Circuit. (See Building and Construction Trades Department v. Joe M. Allbaugh, 172 F. Supp. 2d 138 (D.D.C. 2001), which held that the President lacked constitutional or statutory authority to promulgate Section Three of the EO, which applies to recipients of financial assistance. The District Court issued an order permanently enjoining enforcement of the EO.) OMB further advised that based upon guidance received from White House Counsel and from the Department of Justice, agencies that administer federal grants subject to EO 13202, as amended, should immediately cease implementation of the EO's requirements pending judicial resolution of the appeal. Finally, OMB advised that agencies will be informed at some later date when it is appropriate to begin implementation of the EO.

Notice of Proposed Rulemaking Issued for Governmentwide Debarment and Suspension (Nonprocurement) (67 Fed. Reg. 3266)

On January 23, 2002, thirty Executive branch agencies issued a common notice of proposed rulemaking proposing to make substantive changes and amendments to the common rule on Governmentwide Debarment and Suspension (Nonprocurement). The Interagency Suspension and Debarment Committee coordinated the proposed rule, and comments were due on or before March 25, 2002. Highlights of the proposed revisions include the following:

- Adopting a different approach to the structure and format of the common rule. It is formatted so that matters common to a particular class of readers, or to a particular subject, appear together. This allows readers easy access to information that may be of particular importance to them. The proposed rule uses fewer legal terms, and uses more commonly understood words along with shorter sentences. It also presents information in a question-and-answer format.

- Incorporating some changes that are designed to bring the procurement and nonprocurement debarment rules into greater conformity with each other. For example, Section __.220 of the proposed rule would bring the common rule into closer conformity with the FAR by limiting the mandatory lower-tier application of an exclusion under the common rule to the first procurement level. In addition, the threshold level for application of an exclusion for all procurement-type transactions under a nonprocurement transaction would be set at $25,000, the same amount in the FAR. Section __.860 of the proposed rule is new to the common rule. This section identifies factors that a debarring official may regard as mitigating or aggravating factors. It includes factors that currently appear under § 9.406-1(a) of the FAR.

- Making several modifications to the existing common rule to enhance the effectiveness of, or clarify, requirements and processes. For example, under the proposed rule, a new term is used to refer to ineligibility that arises from sources other than discretionary actions taken under either the common rule or the FAR. This type of ineligibility may arise by operation of a statute, executive order, or other directive and may not be subject to the discretion of the agency suspending or debarring official. The proposed rule refers to these and other forms of ineligibility as "disqualifications." For discretionary actions that result in ineligibility under the suspension and debarment procedures covered by the common rule and the FAR, the proposed rule uses the term "exclusion." Therefore, an ineligibility may result from either a disqualification or an exclusion.

ficant change to the definitions under the proposed common rule relates to the term "conviction." Previously, the common rule defined conviction as a judgment that had to be "entered" by the Court before it was recognized as constituting a ground for suspension or debarment. In recent years, courts have used many vehicles to conclude criminal matters short of "entry" of a judgment of conviction. Under the proposed rule, the suspending or debarring official would be able to consider criminal matters resolved by means short of dismissal as final so that appropriate administrative action can be taken or a remedial plan of compliance concluded.

posed rule also eliminates a requirement under the current rule that the exclusion of suspended or debarred persons from participating in covered transactions be enforced through a chain of paper certifications submitted to an agency or between participants under a covered transaction. Advancements in technology allow anyone with access to a personal computer to receive up-to-date information about a person's eligibility by accessing the GSA List on line. This makes the certification process largely obsolete. The proposed rule would allow agencies to employ any method of enforcement of the GSA List that is administratively and commercially feasible. For instance, to communicate the requirements to participants, an agency could include a term or condition in the transaction requiring the participant's compliance and requiring them to include a similar condition in lower-tier covered transactions.

Impact of Arthur Andersen's Suspension on Recipients' Procurement of New Audit Services

The General Services Administration announced on March 15, 2002 that it had suspended Arthur Andersen from conducting new business with the Federal government, in light of the company's indictment for misconduct related to the Enron Corporation. The suspension is for the duration of Andersen's indictment, is effective throughout the Executive Branch of the Federal government, and applies to all new business. This suspension will have an impact on Federal financial assistance recipients who were contemplating using Arthur Andersen as their auditor, but had not entered a contract for audit services before March 15, 2002. At this time, recipients should not be entering any new contracts with Arthur Andersen for audit services in light of the firm's suspension and addition to the GSA List. Under the common rule on Governmentwide Debarment and Suspension (Nonprocurement), a lower tier covered transaction includes any procurement contract, regardless of amount, for federally-required audit services. Organizations which have been suspended are excluded from participating in all lower tier covered transactions.

Implementation of Federal Data Quality Requirements

On January 3, 2002, the Office of Management and Budget issued final guidelines to Federal agencies to implement the data quality requirements of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106-554. Section 515 directs OMB to issue government-wide guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." By October 1, 2002, agencies must issue their own implementing guidelines that include "administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency" that does not comply with the OMB guidelines. The final guidelines reflect the changes OMB made to earlier guidelines issued September 28, 2001. While the guidelines do not target Federal financial assistance, agencies' implementation of the guidelines could affect grantees. Standard data and publication rights clauses used in awards may need to be revised in some cases or for certain awards, particularly in situations where agencies will be using or disseminating grantee data. Information on the data quality guidelines can be found at **http://www.whitehouse.gov/omb/fedreg/reproducible.html**.

Involvement of Faith-Based Organizations in Federal Programs

Legislation related to the potential involvement of faith-based organizations in some Federal programs remains pending in the U.S. Senate and House of Representatives. This issue, a top domestic priority of President Bush's Administration, was the topic of the Federal Bar Association Grants Committee's panel presentation at the NGMA training conference in 2001. The Senate bill was substantially revised in February 2002, with input from the Administration and others to address potential constitutional concerns. The bill, S. 1924, is now known as CARE, the "Charity, Aid, Recovery, and Empowerment Act of 2002." On the House side, H.R. 7, the Community Solutions Act, passed in 2001. For more information, see **http://thomas.loc.gov/bss/d107query**. In addition, note

that some of the cases identified in Section II below relate to situations in which religion issues have arisen in the Federal grants context.

Scientific Misconduct Policy Implementation

The Administration's deadline for Federal agencies to implement internal requirements for dealing with scientific misconduct in Federally supported research passed in December 2001. The White House Office of Science and Technology Policy had issued a government-wide policy in December 2000, giving agencies a year to implement it. Agencies must implement the policy based on agencies' existing legal authorities. Thus, grantees should be aware that implementation of the policy could vary among Federal programs, based on legal authorities and award terms. OSTP information is available at **http://www.ostp.gov/.**

II. Review of Federal Cases

The following Federal cases are among those from the past year that may be of interest to the Federal grants community. These brief descriptions are provided for general information, not legal guidance. For full information, readers should review the cases in their entirety, as well as related and subsequent cases.

Adarand Constructors, Inc v. Mineta, 534 U.S. 103 (2001) (November 27, 2001). Fedeally supported minority preferences.

In the third appearance of this case before the Supreme Court, the Court dismissed the writ of certiorari as improvidently granted. The writ had been issued to review the 10th Circuit's opinion that the Department of Transportation's revised Disadvantaged Business Enterprise (DBE) program is consistent with the constitutional guarantee of equal protection. The 10th Circuit's determination was based on an analysis of DBE statutes and regulations pertaining to the procurement of Federal funds for highway projects awarded by States and localities. In its briefs and arguments before the Supreme Court, however, Adarand asserted that it was not challenging DOT's State and local program, only the statutes and regulations pertaining to direct procurement of DOT funds for highway construction on Federal lands. Consequently, the Court determined that there had been a significant change in the posture of the case after certiorari had been granted. The writ of certiorari was dismissed because the 10th Circuit had not considered the part of the DBE program that pertains to direct procurement of DOT funds for highway construction on Federal lands. The 10th Circuit also had found that Adarand lacked standing to challenge the direct procurement DBE provisions.

Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426 (Feb. 19, 2002). Privacy of grantee records.

Under the Family Educational Rights and Privacy Act of 1974 (20 USCS 1232g) (FERPA), schools and educational agencies receiving Federal financial assistance must comply with certain conditions. § 1232g(a)(3). One condition specified in the Act is that sensitive information about students may not be released without parental consent. The Act states that Federal funds are to be withheld from school districts that have "a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents." § 1232g(b)(1). The phrase "education records" is defined, under the Act, as "records, files, documents, and other materials" containing information directly related to a student, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." § 1232g(a)(4)(A). The definition of education records contains an exception for "records of instructional, supervisory, and administrative personnel . . . which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." § 1232g(a)(4)(B)(i). The precise question for the Supreme Court was whether peer-graded classroom work and assignments are education records. The Court held that the school-class practice called peer grading did not to violate FERPA, at least during initial stages until a teacher collected and recorded students' grades.

The Court found that student graders only handled assignments for a few moments as the teacher called out the answers. They did not "maintain" the papers within the meaning of 20 U.S.C.S. § 1232g(a)(4)(A) in the same way a registrar maintained a student's folder in a permanent file. Correcting a classmate's work could be as much a part of the assignment as taking the test itself. It was a way to teach material again in a new context, and helped show students how to assist and respect fellow pupils. FERPA did not prohibit those educational techniques. The phrase "by a person acting for an educational institution" modified "maintain." FERPA implied that education records were institutional records kept by a single central custodian, such as a registrar, not individual papers handled by student graders in their classrooms. It was doubtful Congress would have provided the elaborate procedural machinery to challenge the accuracy of a student's grade on every test. Thus, the grades on the peer-graded papers were not covered under FERPA.

MD/DC/DE Broadcasters Ass'n v. FCC, 253 F.3d 732 (D.C.Cir. June 2001) (cert. denied, 122 S.Ct. 920 (Jan. 22, 2002). Federally supported minority preferences.

The Court denied a petition for rehearing of its previous opinion, 236 F. 3d 13 (D.C. Cir. 2001), which vacated the Federal Communications Commission's Equal Opportunity regulation after finding one section of the regulation to be unconstitutional. The Court reiterated that the regulation could not sensibly accomplish its goals if the unconstitutional section is severed. With regard to the section determined to be unconstitutional, the Court noted that if the goal of the FCC was truly broad outreach, it could measure compliance by looking at a broadcaster's outreach efforts rather than by collecting data on the race and sex of applicants and investigating any broadcaster producing few or no women or minorities in its applicant pool. Although this case did not involve a Federal grant, the legal analysis may fit in grants cases.

United Urban Indian Council v. U.S. Dep't of Labor, No. 01-9523 (10th Cir. March 22, 2002). Appeal of grantee selection.

A service provider had provided employment training to Native Americans for many years with grant money from the Department of Labor under the Workforce Investment Act (Act) of 1998, 29 U.S.C.S. §§ 3801-2945. A citizens' group that had served a neighboring area in a similar manner was awarded a grant covering the territory previously covered by the other service provider. The citizens' group argued that the case was moot, or no longer debatable, because the provider could no longer obtain grant money under the regulations for the grant period in dispute. An appeals court agreed. The award for the grant period from July 1, 2002, through June 30, 2004, was made on March 1, 2002. Relief under the Act was prospective only. The provider therefore could not demonstrate that any decision from the Court of Appeals concerning the grant period ending on June 30, 2002, could have altered the decision just made for the next grant period. Further, the provider had not demonstrated that the DOL's failure to designate it the incumbent grantee for the disputed territory during the current grant period would have any affect on the grant decision to be made in 2004. There was therefore no meaningful relief the Court of Appeals could have provided, and the appeal was moot. The Court dismissed the service provider's petition asking the Court to review the matter.

Cal. State Univ. Fullerton Found. v. Nat'l Science Found., No. 01-1470 (4th Cir. Jan. 22, 2002). Cost sharing issue.

The National Science Foundation awarded the California State University Fullerton Foundation a grant, which required the recipient to maintain cost sharing under the grant and keep records of all project costs that were claimed as cost sharing. The agency became concerned about the recipient's ability to meet its cost sharing obligations, and ultimately questioned over half of the amount the recipient finally claimed in cost sharing. The agency ultimately determined that the recipient owed it $139,152. The recipient's sole contention on appeal was that, with regard to cost sharing, the grant "contract" merely incorporated the standard of the statute authorizing the grant, 10 U.S.C.S. § 2196(k). The recipient reasoned that because the agency did not provide more than 50 percent of the project's estimated cost, both the agency and the District Court erred in determining that the recipient owed the agency a refund. An appellate court found no support for this argument. The agency was well within its "contractual" rights to seek relief for the recipient's breach of the parties' agreement; the statutory cap on agency spending did not bear on that issue.

O'Donnell v. Eidleman, No. 00-1901 (4th Cir. June 25, 2001). Grantees' standing to challenge a grant program's actions.

Staff for a grantee providing legal services to the indigent sued the Legal Services Corporation, challenging its actions in connection with the consolidation of service areas and implementation of a competitive program for grant money. The Legal Service Corporation Act (LSCA), 42 U.S.C.S. § 2996 et seq., established the Corporation, which issues the grants. The Court stated that Congress intended the Act for the special benefit of indigent persons in need of legal services. While legal service programs such as those provided by the grantee were an integral part of the process of delivering those services, the programs themselves were not the beneficiaries of the LSCA. Because the grantee's staff was not part of the class Congress sought to benefit in enacting the LSCA, the Court of Appeals concluded that Congress did not intend to imply a private cause of action by the grantee to challenge the Legal Services Corporation's exercise of its statutory and regulatory duties. Accordingly, the Court of Appeals ruled that the District Court was without authority to review the actions of the Legal Services Corporation.

Southern Christian Leadership Conference v. Supreme Court of the State of Louisiana, 252 F.3d 781 (5th Cir. May 29, 2001). Interpretation of grantees' free speech rights.

The plaintiffs in this case alleged that a law school clinic's representation of community groups concerned about local industrial actions induced significant criticism of the clinic from political and business leaders in Louisiana. The clinic was a Federal grant recipient. The university was not responsive to the concerns of the political and business interests, who then urged the state Supreme Court to prevent student clinics from continuing to aid community groups in giving voice to environmental and health concerns, according to the plaintiffs. A Louisiana Supreme Court rule was then revised to limit law students in supervised clinical education programs from representing as attorneys certain parties the legal aid clinics solicited based on income. The Court ruled that the free speech and free association rights of the grantee's student staff were not implicated by this rule. The Court stated that the fact that a

State decides to fund or support a program does not give the government carte blanche to restrict the rights of program participants. The motivation of the State Supreme Court, in this limited context, is irrelevant. The Court referenced an earlier U.S. Supreme Court opinion in another matter, which stated that "this is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope."

United States v. Legal Servs., 249 F.3d 1077, (D.C.Cir. May 25, 2001). Agency access to grantee records; attorney-client privilege.

In its audits of programs of grantee legal services programs, the Inspector General of the Legal Services Corporation issued a subpoena to a legal services provider. When the grantee failed to comply, the OIG sought to have the subpoena enforced in Court. The information sought by the subpoena included identification of the grantee's clients. The grantee contended that the attorney-client privilege and attorneys' professional obligations prevented it from disclosing client names, associated with case numbers, as it would allow the OIG to match names with types of cases. Notwithstanding general restrictions on the OIG's power, under 42 U.S.C.S. § 2996e(b)(3), protecting client identity, § 509(h) of the Omnibus Appropriations Act of 1996, Pub. L. No. 104-134, §509(h), 110 Stat. 1321, 1321-59, explicitly authorized compelling production of information, including client names. Under these circumstances, disclosure was consistent with the grantee's ethical obligations. Compliance with the subpoena would not be unduly burdensome, as the remote possibility of a linkage between client identity and subject matter of cases would not unduly disrupt or seriously hinder the grantee's provision of legal services. The Court ruled that the subpoena was enforceable.

Indiana Family & Social Services Admin. v. Thompson, No. 01-2941 (7th Cir. Apr. 12, 2002). Denial of increased funding.

Under a Federal grant, a State decided to replace its Medicaid information system. It contracted with a company to design and implement an Advanced Information Management System (AIM). Some of the claims slated to come through AIM were Medicare crossover claims, which were ones that concerned people eligible for both Medicare and Medicaid. After AIM went live, the State determined that a high number of crossover claims were being rejected because of the problem with the missing provider numbers. There was a growing backlog of electronic crossover claims. After an on-site certification review of AIM, the U.S. Department of Health and Human Services rejected a claim for an enhanced level of Federal funding to the grantee because it was determined that AIM was not operating continuously in light of the backlog. The decrease in funding was upheld on administrative appeal and on judicial review. An appellate court found that the Secretary of HHS did not err when he concluded that processing did not entail segregating an entire class of claims without regard to whether individual claims within the class were valid or not. The Secretary acted consistently with his statutory authority when he adopted an interpretation of processing that encouraged states to pay valid crossover claims efficiently. The Court of Appeals affirmed the judgment of the District Court.

Arizona v. Thompson, 281 F.3d 248 (D.C.Cir. Mar. 5, 2002). Agency discretion relating to grant program directives.

The U.S. Department of Health and Human Services barred states from using Temporary Assistance for Needy Families (TANF) grants to pay for the common costs of administering the TANF, Medicaid, and Food Stamp programs. States sought to prevent the directive's enforcement, contending that they incurred common administrative costs that benefitted TANF, Medicaid, and Food Stamps and that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Act) permitted them to use their TANF grants to cover costs that benefitted TANF and other programs simultaneously. The D.C. Circuit Court of Appeals found that the Department erroneously determined that it was without discretion to permit the expenditures. The directive did not represent a determination by the Department that it was reasonable to interpret the Act as barring states from allocating their common administrative costs to TANF. Rather, it reflected the Department's incorrect assumption that such an interpretation was the only one that was permissible. The Court concluded that an agency regulation had to be declared invalid, even though the agency might have been able to adopt the regulation in the exercise of its discretion, if it was not based on the agency's own judgment but rather on the unjustified assumption that it was Congress' judgment that such a regulation was desirable or required. The case was sent back to a lower court, with instructions to remand to the Department for further consideration consistent with the Court's opinion.

Heard Communs., Inc. v. Bi-State Dev. Agency, No. 00-3455 (8th Cir. Aug. 31, 2001). Applicability of the Administrative Procedure Act to a grantee.

An agency that operated the public transportation system for the three county, multi-state metropolitan region surrounding the city of St. Louis, Missouri, was not a quasi-Federal agency and thus the Administrative Procedure Act applicable to Federal agencies did not apply to it. It was argued that Federal funds are implicated in this instance because the Federal government provides annual grants to the agency.

Evanston Materials Consulting Corp. v. Dancor, No. 01 C 6077 (N.D.Ill., E.Div. Apr. 2, 2002). Grantee intellectual property dispute.

A consultant formed a company and was awarded a Federal grant, which provided that the company retained all right, title, and interest to any grant-generated invention or discovery. At issue was whether pre-existing agreements the consulting company had with another company were affected by the Federal grant, and vice versa. The consultant stated that the matter is simply an interpretation of the Federal statute that administered the program that made the grant. It said the other company is precluded from asserting any ownership interest in the grant-related intellectual property because the consulting company developed the grant-related intellectual property in connection with a Federal program that is subject to various statutes that set forth ownership as between the National Science Foundation and the grantee. The prior agreement may have some impact on the determination of the intellectual property rights, so a motion to dismiss the case for lack of a controversy was denied.

Nanda v. Bd. of Trs. of the Univ. of Ill., No. 00 C 4757 (N.D.Ill., E.Div. Mar. 15, 2002). Award of back pay to a grantee's employee.

A university professor, the principle investigator in a National Science Foundation grant, filed a discrimination lawsuit due to the university's issuance of a terminal contract, which ended her employment. The professor asked the Court to order the university to pay her salary from the grant. The Court noted the relationship between the NSF, the grantee, and the professor distinguished the situation from an ordinary discrimination and termination suit. The Court denied the immediate request, but indicated that the professor might obtain relief if she was able to prove her civil rights claims later at trial.

Freedom From Religion Foundation v. McCallum, 179 F.Supp.2d 950 (W.D.Wisc. 2002). Constitutionality of faith-based grants.

A State provided State and Federal funds for a program that provided residential treatment to drug and alcohol addicts, which included faith-based counseling. After an advocacy group and taxpayers brought a legal action against the state officials, the Court granted partial summary judgment in favor of the advocacy group and taxpayers. The Court held that: (1) the workforce grant violated the establishment clause of the First Amendment because its unrestricted, direct state funding of the program constituted governmental indoctrination in religion; (2) the record did not provide sufficient facts to determine whether indirect funding through the corrections department resulted from an independent, private choice of program participants; and (3) denial of state funding to the program would not violate its First Amendment rights.

City of San Bruno v. Fed. Emergency Mgmt. Agency,181 F. Supp. 2d 1010 (N.D.Cal. 2001). Grantee eligibility.

A city sued the Federal Emergency Management Agency (FEMA) regarding FEMA's determination that the city was ineligible for federal aid for a landslide. FEMA determined that the city was ineligible for federal aid because the hillside was not a facility under 44 U.S.C.S. § 206.201(c). Specifically, FEMA determined that the hillside was not an improved and maintained natural feature. The Court determined that it lacked subject matter jurisdiction to review FEMA's determination. FEMA was immune from suit under 42 U.S.C.S. § 5148 of the Stafford Act because the eligibility determination was a discretionary act. Even if the determination was subject to review, the determination survived the city's challenge; FEMA's determination was neither arbitrary nor capricious. The case was dismissed.

Winkler v. Chi. Sch. Reform Bd. of Trs., 99 c 2424 (N.D.Ill., E.Div. Aug. 29, 2001). Religious aspects of grantees' activities.

Taxpayers sued the Department of Housing and Urban Development and other Federal agencies and their secretaries for violating the establishment clause of the U.S. Constitution based on their sponsorship of a scouting program that required a belief in God. The agencies were bound to the scouting program's guidelines by way of a charter agreement specifying that they had to agree to accept the program's rules and regulations, including one requiring a belief in God. The taxpayers alleged that government expenditures in support of the program violated the establishment clause. The Court held that the agencies could not be sued without their permission. However, to that extent the taxpayers alleged that the secretaries acted in accordance with unconstitutional grants of power, they could be sued. The taxpayers challenged specific statutes that allegedly contained taxing and spending provisions. The taxpayers also claimed violation of the establishment clause. The suits may now proceed further, consistent with this ruling.

Pedreira v. Ky. Baptist Homes for Children, 186 F. Supp. 2d 757 (W.D.Kent. 2001). Federal funds advancing religion.

An employer adopted a policy that stated that homosexuality was a lifestyle that would prohibit employment there. An employee and a social worker were lesbian and believed that the employer's practices constituted religious discrimination. The employee and the social worker contended that living a homosexual lifestyle constituted a failure to embrace the employer's religious faith or practice. Thus they contended that it was impermissible to base employment decisions upon this lifestyle choice. However, the Court held that the religious freedoms of the women were not impaired by the conduct requirement of the employer. In the same ruling, the Court

addressed allegations of Kentucky taxpayers that Kentucky's allocation of Federal and state government funds to the employer violated the Establishment Clause because the funding had the primary effect of advancing religion. The Court held that, under the definition of religious use, the allegations in the complaint were sufficient to state a claim upon which relief could be granted. The womens' case was dismissed, while the taxpayers' case was permitted to proceed.

California-Nevada Methodist Homes v. Fed. Emergency Mgmt. Agency, 152 F. Supp. 2d 1202 (N.D.Cal. 2001). Denial of a supplemental award.

A non-profit organization owned and operated a retirement community with a skilled-nursing facility. The community was damaged by an earthquake and the organization sought disaster-relief funds. The Federal Emergency Management Agency granted the organization more than ten million dollars. However, the agency refused to approve additional money in relief that the organization requested. The organization filed two appeals with the agency. The agency denied the appeals and stated that because the work was not required as a direct result of the disaster, it was not eligible for funding. The organization brought suit against the agency. The Court found that decisions involving the allocation and deployment of limited governmental resources were the type of administrative judgment that the discretionary function exception was designed to immunize from suit. Under the agency's regulations, approval of all funding decisions, regardless of whether the agency had approved other repairs and regardless of whether the expenses were eligible, was entirely discretionary. The case was dismissed.

United States v. Illinois, 144 F. Supp. 2d 990 (C.D.Ills., Springfield Div. 2001). Collection of grantee debts; statute of limitations.

The United States made a Criminal Justice Act grant of Federal money to a State, to be used to provide legal services in Federal death penalty habeas corpus cases. A 1993 audit concluded that $ 35,787 of the grant funds had been used for obligations incurred outside the period of the grant or for purposes not allowed by the grant. The United States demanded a refund. The debt was not repaid, so in 2001, the United States filed suit against the State for repayment of the debt. The State moved to dismiss the suit, arguing that the United States did not file the suit before the applicable statute of limitations period expired, and that the United States was barred from pursuing the debt because the Criminal Justice Act grant did not expressly allow the government to pursue a breach of contract claim in court. The State's motion to dismiss the case was denied because by sending letters in 1995 and 1999, it bought time and provided unequivocal written acknowledgments of the debt, which started anew the six-year statute of limitations. Furthermore, the limited collection of remedies alleged would have led to an absurd result, leaving the United States without an avenue for recovering misspent funds. Finally, nothing in the grant as a whole suggested that the parties intended to limit the United States' rights to the limited remedies of reduction, suspension, termination, or disallowance of additional grant payments. The case was not dismissed.

Esperanza Peace and Justice Center v. City of San Antonio, Cause No.SA-98-CA-0696-OG (W.D.Tex., San Antonio Div. May 15, 2001). First amendment rights of grant applicants.

Nonprofit organizations alleged that a city council voted to discontinue their arts funding based upon opposition to the nonprofits'' support of gay and lesbian issues. The Court determined that the nonprofits' constitutionally protected conduct was a substantial or motivating factor in the decision of a majority of council members, and it was not shown that the city council would have made the same decision absent the nonprofits' viewpoints. Among other issues, the Court also determined that the nonprofits' equal protection rights were violated because it was treated differently from other similarly-situated arts organizations, without providing a rational basis. While the Court's opinion did not indicate whether the grant program involved Federal, state, or local funds, the issues discussed may be useful in a Federal grants context.

Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., Case No. 4:99CV354 SNL (E.D. Mo., E.Div. May 9, 2001). False grantee certifications.

A tenants' association argued that the approval by the Department of Housing and Urban Development (HUD) of a loan should be set aside because the approval was 1) in excess of statutory jurisdiction and authority because it was contrary to statutory and regulatory commands; 2) without observance of procedure required by law in that it failed to follow its own procedures; and 3) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court disagreed and granted a judgment in favor of HUD. The Court found that plaintiffs sought the wrong relief. The Court could not set aside a Federal agency's approval of an application because the city included a false certification in its application. The statute and its regulations simply required the city to certify that it had a certain procedure in place, and it did. HUD was not required to verify the accuracy of that certification. The approval of the application was not contrary to the national housing goals. There was also no evidence that HUD knew for a fact that defendant city's certification was false. The Court could not find that the decision was arbitrary and capricious, or that HUD failed to consider relevant factors.

United States HUD v. K. Capolino Constr. Corp., 01 Civ. 390 (JGK) (S.D.N.Y. May 7, 2001). *Withholding Federal funds from a grantee's creditors.*

The U.S. Department of Housing and Urban Development brought this action pursuant to 42 U.S.C.S. § 1437 and the Court's equitable jurisdiction to prevent Federal funds from being used to satisfy a judgment in a defamation action brought by construction company and its owner, against a housing authority and two of the housing authority's individual employees. HUD argued that the housing authority was in financial trouble and without a preliminary injunction would execute on the funds and disburse them to their creditors. The housing authority did not respond to this argument and had conceded that they were "hurting." The Court granted HUD's motion to prevent the Federal funds disbursed to the grantee from being given to the grantee's creditors.

Knight v. United States, No. 99-990 C (Fed.Cl. Apr. 5, 2002). *Privity of contract between a Federal agency and a grantee's employees.*

Former employees of a Head Start provider sued the United States, seeking breach of contract damages in connection with their work. The United States contended that the Court lacked jurisdiction to consider the former employees' claim on the ground that a contract did not exist between the former employees and the United States. The Court concluded that there was no contract between the former employees and the United States because there was no privity of contract between the parties. Specifically, the letters addressed to the Head Start grantee, the former employer, were not addressed to the former employees and did not identify any action that the former employees or any other employee were required to take with regard to the employer's voluntary relinquishment of its Head Start grant. Moreover, nothing in the regulations governing the appeal procedures for a Head Start grantee established a contractual right to sue for the grantee's employees. The former employees were not third party beneficiaries of the contract between the employer and the United States because the agreement clearly indicated that the not all of the grantee's employees were guaranteed employment with an interim grantee after their employer relinquished its Head Start grant.

Thermalon Indus. v. United States, 51 Fed. Cl. 464 (Jan. 16, 2002). *Grants as contracts; some inadequately documented costs allowed.*

A National Science Foundation (NSF) grantee with disallowed costs in an audit sued the government for breach of contract. The final audit concluded that the corporation had failed to comply with the Federal Acquisition Regulation (FAR) cost principles incorporated into the award, the NSF Grant Policy Manual, the Grant General Conditions, and other appropriate NSF and Federal compliance requirements. Subsequently, the corporation submitted a statement of its termination costs. The Court determined that the standard of review in the case would be "de novo," that is, as if it were the first time the issues were considered, in part because the NSF made no findings of fact or law to which the court could defer. The Court concluded that the FAR did not bar the corporation from claiming the employee's salary as an allowable expense. The Court reasoned that the FAR did not require that promissory notes qualifying as deferred compensation actually be paid in the year that the obligation accrued. The Court also found that over 2,000 hours of the employee's direct labor as principal investigator for the grant were allowable. The Court, considering the grant in the nature of a contract, reviewed the facts and allowed the grantee to retain some funds in allowable grant performance costs, and allowed NSF to recoup some disallowed costs and unspent funds.

United States v. Mitchell, Criminal Action 96-407-1, (E.D.Pa. Apr. 11, 2002). *Proposed alternative use of a grant solicitation.*

A man convicted of robbery sought a new trial, claiming that a solicitation issued by the U.S. Justice Department for research regarding fingerprint identification was material to his case because he could have used it to impeach the government's fingerprint witnesses. The Court found that the solicitation was not material; accordingly, a new trial was not appropriate. The solicitation was not meant to set forth the state of current research, but rather was intended only to set forth sufficient information that researchers could apply for funds to perform further research regarding fingerprint technology. Any heightened cross-examination that the defense might have conducted of the government's witnesses using the solicitation would not have had any impact on the trial. The Court also noted that it was doubtful that it would have admitted the solicitation for use in cross-examining the government's witnesses at trial.

Kong v. Min De Parle, No. C 00-4285 CRB (N.D.Cal. Nov. 13, 2001). *Federal funding of religious organizations.*

A Federal statute that granted exemptions from Medicare and Medicaid requirements for religious non-medical health care institutions did not violate the Establishment Clause of the First Amendment. The case might have implications in the debate over the constitutionality of issuing Federal grants to faith-based organizations.

Cases of Potential

Discrimination (note differences among circuits regarding whether States accepting Federal funds waive sovereign immunity):
Johnson v. Louisiana, No. 01-2002 SECTION: E/5 (E.D.La. Jan. 18, 2002); Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 188 F. Supp. 2d 1148 (S.D.D.C., Central Div. Feb. 8, 2002); Miller v. Tex. Tech Univ. Health Sci. Ctr., Civil Action Cause Number 2:00-CV-364-J (N.D.Tex. Amarillo Div. Feb. 7, 2002); Bowers v. NCAA, 171 F. Supp. 2d 389 (D.N.J. Nov. 7, 2001); Panzardi-Santiago v. Univ. of P.R., Civil No. 95-2316(CCC/ADC) (D.P.R., Mar. 19, 2002); Douglas v. Cal. Dep't of Youth Auth., 271 F.3d 812 (9th Cir. 2001); Douglas v. Cal. Dep't of Youth Auth., No. 99-17140 (9th Cir. Apr. 12, 2002); Grandson v. Univ. of Minn., 272 F.3d 568 (8th Cir. 2001); Cherry v. Univ. of Wis. Sys. Bd. of Regents, 265 F.3d 541(7th Cir. 2001); Smith v. NCAA, 266 F.3d 152 (3d Cir. 2001); Lieberman v. Delaware, Civil Action No. 96-523 GMS (D.Del Aug. 20, 2001).

False Claims Act: Dookeran v. Mercy Hosp. of Pittsburgh, 281 F.3d 105 (3rd Cir. 2002); United States v. Totten, No. 01-7071 (D.C.Cir. Apr. 16, 2002); United States v. Turn Key Gaming, 260 F.3d 971 (8thCir. 2001); Hutchins v. Wilentz, 253 F.3d 176 (3rd Cir. 2001); United States v. North Am. Constr. Corp., 173 F. Supp.2d 601 (S.D.Tex, Houston Div. 2001); United States v. City of L.A., 160 F.Supp.2d 1092 (C.D.Cal. W.Div. 2001).

Environmental policy: Sierra Club v. U.S. Fish & Wildlife Serv., 189 F. Supp.2d 684 (W.D. Mich. 2002); Atl. States Legal Found., Inc. v. Whitman, No. 00-6329 (2d Cir. July 10, 2001);
Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd., 252 F.3d 246 (3d Cir. 2001).

Criminal: United States v. Suarez, No. 99-1521 (6th Cir. Aug. 8, 2001); United States v. Sherburne, 249 F.3d 1121 (9th Cir. 2001).

Sgnificant cases inadvertently omitted from last year's compilation

Alexander v. Sandoval, 532 U.S. 275 (2001). Civil rights of grant beneficiaries.

As a recipient of Federal financial assistance, the Alabama Department of Public Safety (Department), of which petitioner Alexander is the Director, is subject to Title VI of the Civil Rights Act of 1964. Section 601 of that Title prohibits discrimination based on race, color, or national origin in covered programs and activities. Section 602 authorizes Federal agencies to effectuate §601 by issuing regulations, and the Department of Justice (DOJ) in an exercise of this authority promulgated a regulation forbidding funding recipients to utilize criteria or administrative methods having the effect of subjecting individuals to discrimination based on the prohibited grounds. Sandoval brought this class action to enjoin the Department's decision to administer state driver's license examinations only in English, arguing that it violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination based on their national origin. Agreeing, the District Court enjoined the policy and ordered the Department to accommodate non-English speakers. The Eleventh Circuit affirmed. Both courts rejected the petitioners' argument that Title VI did not provide respondents a cause of action to enforce the regulation. The Supreme Court held that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI.

Legal Services Corp. v. Velaquez, 531 U.S. 533 (2001). Free speech rights of grantees.

The Legal Services Corporation Act authorizes the Legal Services Corporation (LSC) to distribute funds appropriated by Congress to local grantee organizations providing free legal assistance to indigent clients in welfare benefits claims. In every annual appropriations Act since 1996, Congress has prohibited LSC funding of any organization that represented clients in an effort to amend or otherwise challenge existing welfare law. Grantees cannot continue representation in a welfare matter even where a constitutional or statutory validity challenge becomes apparent after representation is well under way. Lawyers employed by LSC grantees, together with others, filed suit to declare the restriction invalid. The District Court denied them a preliminary injunction, but the Second Circuit invalidated the restriction, finding it impermissible viewpoint discrimination that violated the First Amendment. The Supreme Court held that the funding restriction violates the First Amendment.

Jana Gagner, Eric Moll, and Percy Robinson contributed to the reports in this publication.

The Grants Committee of the Federal Bar Association's Government Contracts Section hopes you find this handout helpful. If you are an attorney, we invite you to join us. If you are not an attorney, encourage the attorneys you encounter who practice in the grants law field to join us.

As the professional organization for private and government lawyers and judges involved in Federal practice, the FBA has offered an unmatched array of leadership opportunities and services for more than 75 years. The Grants Committee, part of the FBA's Government Contracts Section, meets monthly for a brown bag luncheon at a downtown Washington, D.C. law firm convenient to Metro. The Committee sponsors a variety of programs, including a panel presentation on a timely legal issue at the National Grants Management Association's annual training conference.

The Committee also sponsors an Internet listserv on grants law matters, to which non-members may also subscribe. To participate in the listserv, send an e-mail to ***esharp@doc.gov,*** *with a message stating your e-mail address and asking to join the listserv. You may obtain information about joining the FBA at* ***http://www.fedbar.org/join.html.*** *For more information about the Grants Committee, contact the Committee Co-chair, Edward Sharp, at (301) 713-2175, e-mail:* ***Esharp@doc.gov.***